

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED  
MAY 5 1997  
Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
American Communications Services, Inc. ) CC Docket No. 97-100  
 )  
Petition for Expedited Declaratory Ruling Preempting )  
Arkansas Public Service Commission Pursuant to Section )  
252(e)(5) of the Communications Act of 1934, as amended )

### COMMENTS

Sprint Communications Company, L.P. hereby respectfully submits its comments in the above-captioned proceeding in response to the Public Notice released April 3, 1997, DA 97-652.

#### I. SUMMARY AND INTRODUCTION.

In the instant petition, American Communications Services, Inc. ("ACSI") asserts that the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") prevents the Arkansas PSC from considering the full range of interconnection options permissible under the Telecommunications Act of 1996 ("Federal statute" or "1996 Act"), and has prohibited the PSC from designating new entrants as Eligible Telecommunications Carriers for universal service, thereby thwarting the development of local competition. ACSI asserts that because the Arkansas Act has removed the Arkansas PSC's legal ability to fulfill its statutory responsibilities under the 1996 Act, the Commission should issue a declaratory ruling pursuant to sections 252(e)(5), 253(d), and 254(f) of the federal Act preempting the Arkansas PSC from arbitrating and approving interconnection agreements, and from refusing requests by competitive local

No. of Copies rec'd  
List ABCDE

027

exchange carriers ("CLECs") for designation as carriers qualified to receive universal service support.

Sprint supports ACSI's petition in part. Sprint believes that the Federal Communications Commission ("FCC" or "Commission") should preempt the Arkansas Public Service Commission's ability to mediate, arbitrate, and approve interconnection agreements between incumbent local exchange carriers ("ILECs") and new entrants. That commission has effectively lost the ability to advance the cause of telecommunications competition in Arkansas, contrary to the expectations of Congress and the FCC. As such, the FCC must, under Section 252(e)(5) of its enabling legislation, preempt the Arkansas commission. The FCC should also preempt the Arkansas legislation in those instances where it conflicts on its face with Federal laws and regulations. However, the FCC should not preempt the Arkansas legislation's provisions relating to universal service support because it would be premature to do so.

**II. THE ARKANSAS STATUTE UNREASONABLY LIMITS THE ARKANSAS PSC'S ABILITY TO MEDIATE, ARBITRATE AND APPROVE INTERCONNECTION AGREEMENTS AND IN MANY INSTANCES CONFLICTS WITH FEDERAL LAW.**

ACSI states (p. 12) that the Arkansas Act prohibits the Arkansas PSC from prescribing unbundled network elements or from imposing new conditions on the incumbent LEC except as prescribed by the FCC. ACSI asserts that this provision "completely eviscerated the bona fide request process," and forces would-be interconnectors to bring every unbundled network element request to the FCC. By prohibiting the PSC from considering and implementing anything other than what the FCC has already prescribed, the Arkansas PSC "cannot accomplish the federal goals set forth in the Communications Act and the Local Competition Order – to 'remove

the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition...” (Petition, p. 14).

Sprint supports ACSI’s petition insofar as it requests that the Commission preempt the Arkansas Public Service Commission’s (“APSC”) ability to arbitrate and approve interconnection agreements between an ILEC and its competitors. Sprint believes that the Arkansas Telecommunications Regulatory Reform Act of 1997 (“Arkansas Act”) so hobbles the ability of the APSC to carry out the functions envisioned by Congress and the Commission in the Telecommunications Act of 1996 and the regulations issued in response to same as to render the APSC virtually impotent.

Sprint also notes that multiple provisions of the Arkansas Act also conflict on their face with federal law and must be preempted for that reason as well. As the Commission has previously recognized, Federal law preempts state law when 1) Congress has expressed a clear intent to preempt state law, 2) Congress has legislated comprehensively to occupy an entire field of regulation or 3) state law actually conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. *See, e.g.,* the Common Carrier Bureau’s decision in *Atlantic Richfield Company*, Mimeo No. 1115, released November 27, 1985 at 7, *aff’d* 3 FCC Rcd 3089 (1988), *aff’d sub nom. Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989). The Arkansas Act handily fulfills the third test for preemption by conflicting with the Commission’s Rules or by standing as an obstacle to the scheme intended by Congress.

As ACSI points out in its petition, by enacting Section 252(e)(5) of the Communications Act, Congress expressly recognized the possibility that a state commission would be unwilling or unable to carry out its responsibilities under that Act, thereby standing as an obstacle to the

statutory scheme. In that event, it provided that the Commission “shall” issue an order preempting the State commission’s jurisdiction. This is such a case.<sup>1</sup>

For example, and as ACSI pointed out, under the Arkansas Act a CLEC is unable to negotiate with an ILEC for any additional network elements beyond the minimum set established by the Commission. In para. 366 of the *First Report and Order*,<sup>2</sup> however, the Commission expressly recognized that parties could voluntarily negotiate for additional network elements. The Arkansas Act precludes this possibility and denies to both ILECs and CLECs the ability to have such additional elements. It would do so even when the ILEC, the CLEC, and the APSC all agreed that this result is desirable and in the public interest.<sup>3</sup>

In the important area of resale, Section 9(d) of the Arkansas Act provides that except to the extent required by the Communications Act and the Arkansas Act, the APSC “shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications service . . .” and that “[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale.” In the *First Report and Order*, the Commission explicitly recognized the danger to competition that could result from the conditions attached to promotions and dis-

---

<sup>1</sup> Sprint does not here attempt to identify each and every manner in which the Arkansas Act conflicts with federal law or interferes with the APSC’s ability to perform its duties under federal law. Attachment 2 to ACSI’s Petition is a useful summary of these many conflicts.

<sup>2</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), *review pending sub nom.* Iowa Utilities Board, *et al.* v. FCC, No. 96-3321, 8th Circuit (“First Report and Order”).

<sup>3</sup> Section 9(a) of the Arkansas Act provides, in pertinent part, that “[i]n no event shall the [APSC] impose any interconnection requirements that go beyond those requirements imposed by

*Footnote continued on next page*

counts. An ILEC might, for example, make discounts or promotions available only to end user customers and not to resellers, thereby damaging the reseller's ability to compete.

The Commission therefore stated at para. 952 of the *First Report and Order* that while there might be reasonable restrictions on the availability of promotions and discounts to resellers, this was a "decision best left to state commissions." But under the Arkansas Act, an ILEC can apparently discriminate at will against reseller CLECs through the use of restrictions on promotions and discounts, and the APSC can do nothing about it.<sup>4</sup>

Section 9(g) of the Arkansas Act requires the APSC to approve resale restrictions which prohibit resellers from aggregating the usage of multiple customers on resold local exchange services. Para. 953 of the *First Report and Order*, however, provides that "We believe restrictions on resale of volume discounts will frequently produce anti-competitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable." The APSC has no ability to make this presumption a meaningful one.

Given the stringent restrictions which the Arkansas Act has placed upon the APSC, the best the APSC will be able to do when faced with an issue in an arbitration or negotiation concerning what is or is not required under federal law when a matter has not been explicitly addressed by the Commission is to seek further guidance from the FCC; under the Arkansas Act,

---

the Federal Act or any interconnection regulations or standards promulgated under the Federal Act."

<sup>4</sup> Cf. *Resale and Shared Use*, 60 FCC 2d 261, *recon.* 62 FCC 2d 588, *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. den.* 439 U.S. 875 (1978).

the APSC has little or no ability to exercise the discretion that Congress and the FCC intended the APSC to have.

Since many of the requirements of federal law, as interpreted by the Commission, are not self-executing, arbitrations or negotiations in Arkansas are likely to be lengthy affairs, punctuated by multiple interlocutory queries to the Commission seeking interpretation and guidance from the latter. The same result is likely to occur with respect to the approval of interconnection agreements. Such a process does little to advance the cause of competition in Arkansas and is a poor use of the Commission's limited resources. It does, however, help to entrench the incumbent. Under such circumstances, the APSC is, in Sprint's view, effectively unwilling or unable to carry out its responsibilities. The Commission must therefore preempt the APSC's ability to arbitrate and approve interconnection agreements, as is required under Section 252(e)(5).

The Arkansas Act also contains provisions which conflict explicitly with the provisions of the Communications Act and with the Commission's *First Report and Order*. For example, as noted above, Section 9(d) of the Arkansas Act provides flatly that promotions and temporary discounts offered by the local exchange carrier to its end-user customers need not be available for resale. But at para. 948 of the *First Report and Order*, the Commission said "[N]o basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." The Commission also warned that ILECs "may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions." *Id.* at para. 950.<sup>5</sup>

---

<sup>5</sup> Even if a reseller were able to obtain service on a nondiscriminatory basis from an incumbent LEC, it would be forced to pay a price for that service which is higher than that mandated by Congress. Section 252(d)(3) requires the APSC to determine wholesale rates based upon retail

Similarly, Section 9(f) of the Arkansas Act provides that “. . . [T]he [APSC’s] authority with respect to interconnection, resale and unbundling is limited to the terms, conditions and agreements pursuant to which an incumbent local exchange carrier will provide interconnection, resale or unbundling to a CLEC for the purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services *to end-user customers*” (emphasis supplied).

Para. 184 of the *First Report and Order*, however, makes clear that ILECs “must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both.” Para. 185 makes crystal clear that “parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).” Interexchange carriers (IXCs), of course, are the primary users of exchange access and are not end-user customers. The Arkansas Act would deny interconnection to CLECs seeking to serve IXCs such as Sprint, in direct contravention of the Commission’s holding.

Finally, In a misguided attempt to “level the playing field” between CLECs and ILECs, Section 11(e) of the Arkansas Act requires that “All future rule changes promulgated by the Commission shall apply equally to all providers of basic local exchange service.” In para. 1247 of the *First Report and Order*, however, the Commission made clear that it would be “inconsistent with the statute” for states to be allowed to impose upon non-incumbent LECs obligations which the 1996 Act imposes only on incumbents.

---

rates less avoided costs. Section 9(g) of the Arkansas Act, however, explicitly requires such wholesale rates to include “additional costs that will be incurred as a result of selling the service for the purpose of resale.”

### **III. ACSI's REQUEST FOR PREEMPTION OF ARKANSAS' UNIVERSAL SERVICE SUPPORT REQUIREMENTS FOR ETCs IS PREMATURE.**

Section 5(b) of the Arkansas Act contains the requirements for designation as an eligible telecommunications carrier (ETC) and receipt of high cost universal service support by ETCs.

These requirements include the following:

- the incumbent LEC "shall be the eligible telecommunications carrier within [its] local exchange area" (Section 5(a));
- any other carrier which wishes to receive universal service support must offer and agree to provide service to all customers in an ILEC's local exchange area, using its own facilities or a combination of its own facilities and resale of another carrier's services (Section 5(b)(1));
- an ETC shall receive universal service funding only for the portion of its facilities that it owns and maintains (Section 5(b)(2));
- the Arkansas PSC must determine that designation as an ETC is in the public interest (Section 5(b)(5)).

ACSI states (p. 17) that these requirements "effectively disqualify all CLECs that cannot replicate the incumbent LEC's comprehensive local networks or serve most residential customers economically," and thus "is flatly inconsistent with Section 214(e)(1)(B)," which requires that other telecommunications providers acting as an ETC "advertise the availability of...services [supported by the Federal universal service support mechanisms] and the charges therefor using media of general distribution." ACSI also asserts (p. 16) that these ETC requirements are contrary to Section 254(f) of the 1996 Act, which provides that states may only adopt regulations not inconsistent with the FCC's rules to preserve and advance universal service, and Section 253 of the 1996 Act, which forbids states from erecting barriers to local market entry.

Federal preemption of this portion of the Arkansas Act is premature. The FCC has not yet adopted high cost universal service support rules, and it is not entirely clear that Section 5(b) of the Arkansas Act is inconsistent with the federal statute or violates federal rules. Until federal rules are adopted, the FCC should refrain from overturning Arkansas' state USF regulations. Where Section 5(b) of the Arkansas Act is ambiguous, Sprint offers below an interpretation

which, if accepted, would render this section consistent with the intent and spirit of the Federal statute.

**Section 5(b)(1):** The 1996 Act specifies that only common carriers shall be eligible to receive high cost universal service support; therefore, the Arkansas Act's requirements that an ETC offer service to any customer in the designated service area, and provide service to any such customer who requests it, do not appear unreasonable.<sup>6</sup> Moreover, Section 214(e)(2) of the 1996 Act does authorize State commissions to designate the service area which an ETC must serve. Thus, Arkansas appears to be within its rights in specifying the ILEC's serving area as the relevant service area for an ETC. However, Sprint would note that the Federal-State Joint Board on Universal Service has recommended that the FCC "encourage states, where appropriate to foster competition, to designate service areas that do not disadvantage new entrants," and that the FCC, "where necessary to permit efficient targeting of universal support, establish the level of universal service support based on areas that may be smaller than the service area designated by the state."<sup>7</sup> The requirement that a CLEC cover the same service area as does the ILEC, as is required under the Arkansas Act, is sufficiently onerous as to discourage CLEC market entry, in violation of Section 253 of the 1996 Act. Therefore, the FCC should consider this issue in its universal service proceeding to ensure that CLECs in Arkansas receive a level of universal service support which will foster competition in the local services market.

Section 214(e)(1)(A) requires ETCs to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)..." Sprint believes that this section applies to carriers seeking designation as an ETC in order to receive both federal and state uni-

---

<sup>6</sup> Although an ETC is required to provide service to any customer within the designated service area who requests it, the ETC does have some control over the attractiveness of its service offerings to particular market segments. For example, an ETC could target its advertising towards the market segment it is most interested in serving, or adopt rate structures and rate levels which are attractive primarily to those market segments.

<sup>7</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended Decision* released November 8, 1996, paras. 176, 178.

versal service support, and therefore recommends that the list of services which an ETC is required to provide in order to qualify for high cost support be the same in the interstate and intrastate jurisdictions. Jurisdictional consistency in this regard will help to ensure that potential new entrants provide a minimum level of essential local services, while not overburdening them to the extent that entry is discouraged by requiring them to invest in the facilities and other resources needed to provide services which are not essential, or which are not widely demanded by end users. The Joint Board has recommended that single-party service, voice grade access to the public switched telephone network, DTMF (dual tone multi-frequency) or its functional digital equivalent, access to emergency services, access to operator services, access to interexchange service, and access to directory assistance, be designated for universal service support pursuant to Section 254(c)(1) of the 1996 Act (*Joint Board Recommended Decision*, paras. 46, 65). This list of services represents a balance which was widely supported by parties which participated in CC Docket No. 96-45: it is sufficiently comprehensive, yet not so onerous as to create a barrier to entry for potential new competing carriers. The Joint Board's recommended list of services should thus be used to determine eligibility for both federal and state high cost universal service support.

**Section 5(b)(2):** This section should be interpreted as allowing high cost USF support where the ETC uses its own facilities or cost-based unbundled network elements obtained from the ILEC to provide local service. High cost support should be given whenever the ETC incurs facilities costs which do not already incorporate a universal service subsidy payment. Thus, a qualifying CLEC which provides service using its own facilities or recombined unbundled network elements obtained from the ILEC and for which it pays cost-based rates, should be eligible to receive universal service support for those facilities. However, under conditions of pure resale of ILEC facilities, the universal service support payment should go to the ILEC, not the CLEC. In that scenario, the reseller CLEC is not providing any of its own network facilities; rather, it is obtaining service out of the wholesale tariff (retail rates less avoided costs), and thus is already getting the benefit of universal service payments inherent in the ILEC's retail rates.

**Section 5(b)(5):** Section 214(e)(2) states in part that “[u]pon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).” To the extent that Section 5(b)(5) of the Arkansas Act is a mandate for the Arkansas PSC to evaluate whether a would-be ETC meets the eligibility requirements specified in the 1996 Act, and that the PSC must grant ETC designation to those carriers which are eligible as a matter of the public interest, there is no conflict with the Federal statute.

On the other hand, ACSI is correct in asserting (p. 18) that state PSCs may not withhold ETC status to any carrier serving non-rural areas so long as that carrier satisfies the eligibility requirements in section 214(e)(1). To the extent that Section 5(b)(5) of the Arkansas Act proposes to add another eligibility requirement not set forth in section 214(e)(1) of the Federal statute – namely, that designation as an ETC must satisfy some State-defined public interest standard – the Arkansas Act is in conflict with the 1996 Act.

Whether Commission preemption of Section 5(b)(5) of the Arkansas Act is warranted or not depends upon which of the above conflicting interpretations is correct. Presumably, the State of Arkansas will participate in this proceeding. Thus, Sprint defers a recommendation on this portion of ACSI’s petition pending clarification by Arkansas as to its interpretation of this section of its statute.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY, L.P.

A handwritten signature in dark ink, appearing to read "Leon M. Kestenbaum", written over a horizontal line.

Leon M. Kestenbaum

Kent Y. Nakamura

Norina T. Moy

1850 M St., N.W., Suite 1110

Washington, D.C. 20036

(202) 857-1030

May 5, 1997

## CERTIFICATE OF SERVICE

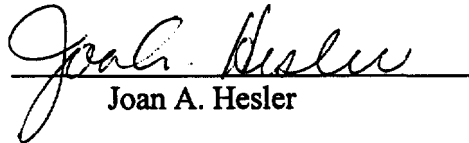
I hereby certify that a copy of the foregoing **Comments of Sprint Communications Co. LP** was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 5th day of May, 1997 to the below-listed parties:

Regina Keeney, Chief  
Common Carrier Bureau  
Room 500  
Federal Communications Comm.  
1919 M Street, N.W.  
Washington, D.C. 20554

Janice Myles\*  
Common Carrier Division  
Room 544  
Federal Communications Comm.  
1919 M Street, N.W.  
Washington, D.C. 20554

International Transcription  
Service  
1919 M Street, N.W.  
Washington, D.C. 20554

Brad Mutschelknaus  
Danny Adams  
Marieann Machida  
Kelly Drye & Warren, LLP  
1200 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
Counsel for ACSI

  
Joan A. Hesler

\* Two copies delivered.